UPREME COURT, U. S.

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No. 355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
COMMON CARRIER CONFERENCE-IRREGULAR ROUTE
REGULAR COMMON CARRIER CONFERENCE,
Appellants,

v.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, National Motor Freight Traffic Association, Inc., Common Carrier Conference-Irregular Route, and Regular Common Carrier Conference appeal from a judgment of the United States District Court for the District of Columbia which dismissed appellants' complaint challenging the lawfulness of an order of the Interstate Commerce Commission. Appellants submit this statement to

show this Court has jurisdiction of the appeal and that substantial questions warranting plenary review are presented.

OPINIONS BELOW

The *per curiam* opinion of the District Court in *National Freight Traffic Association, Inc., et al.* v. *United States, et al.* is unreported. The opinion and the court's judgment appear in the Appendix hereto at pages 4a and 6a, respectively. The order of the Interstate Commerce Commission, together with the recommended report and order of the hearing examiner which it adopts, is reported at 105 M.C.C. 199 (1966), and appears at page 8a et seq. of the Appendix hereto.

JURISDICTION

This action was brought by appellants pursuant to the provisions of 28 U.S.C. §§ 1336, 2284 and 2321-2325 to enjoin, annul and set aside an order of the Interstate Commerce Commission dismissing a complaint in Docket No. MC-C-3192 (Sub No. 33), *National Motor Freight Traffic Association, Inc., et al.* v. *Pacific Progress Shippers Association, Inc., et al.*, 105 M.C.C. 199 (1966). The judgment of the district court dismissing appellants' suit with prejudice was entered March 19, 1968. Notice of Appeal was filed by appellants in the district court on May 17, 1968. This Court has jurisdiction under 28 U.S.C. §§ 1253 and 2101(b) to review the judgment of the district court on direct appeal. *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744 (1963); *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964)

STATUTES INVOLVED

The pertinent statutory provisions are Sections 402(a)(5), 402(a)(7), 402(c)(1), and 410(a) of the Interstate Commerce Act, 49 U.S.C. §§ 1002(a)(5), 1002(a)(7),

1002(c)(1), 1010(a), and Sections 557 and 706 of the Administrative Procedure Act, 5 U.S.C. §§ 557, 706, which provisions are set forth in the Appendix hereto at page 1a et seq.

QUESTIONS PRESENTED

1. May the Interstate Commerce Commission exempt an association of shippers from regulation under Part IV of the Interstate Commerce Act pursuant to Section 402 (c) thereof on the basis of a determination that the shipper members bear the financial risk and burdens of the association, where the Commission made no findings of fact to support this conclusion, and where the record established that the association is incorporated; that its members are protected from all liability for the operating expenses and debts of the association by its corporate charter and by-laws; and that the only obligation a member undertakes is to pay the association's freight charges for transportation performed at his request?

2. Is the Commission's decision contrary to this court's decisions in *United States* v. *Pacific Coast Wholesalers' Association*, 338 U.S. 689 (1950) and *United States* v. *Drum*, 368 U.S. 370 (1962)?

3. On appeal from an order of the Interstate Commerce Commission grounded on the absence of a statement of findings and conclusions or reasons or bases to support the Commission's determination of a material issue of fact and law involving the construction of Section 402(c) of the Interstate Commerce Act, may the district court dismiss the appeal under the Administrative Procedure Act without deciding the relevant questions of law and statutory interpretation raised therein on the ground that ". . . the answer to the problem is more easily reached by direct consideration of the terms of the statute itself."?

STATEMENT

Appellants are three national organizations of common carriers of property by motor vehicle operating in interstate commerce under certificates of public convenience and necessity issued by the Interstate Commerce Commission. Their combined memberships comprise virtually all of the nation's regulated motor carriers which perform interstate transportation of general commodities throughout the continental United States. Each organization is charged under its charter and by-laws with the duty of protecting the interests of its members and each from time to time institutes and participates in administrative and judicial proceedings concerning the lawfulness of the operating practices of persons engaged in performing transportation or in rendering transportation services in competition with its members. Pursuant to Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b, appellant National Motor Freight Traffic Association, Inc. is the agency by which some 4,000 of its member carriers collectively discharge their duty under Section 216 of that Act, 49 U.S.C. § 316, to establish and maintain lawful classifications of property and lawful rules, regulations and practices governing the transportation they perform. In *National Motor Freight Traffic Association* v. *United States*, 372 U.S. 246, 247 (1963) the Court held that this appellant performs "significant functions in the administration of the Interstate Commerce Act," and has standing to represent its members in judicial proceedings in which the validity of the actions of administrative agencies is at issue.

On September 11, 1963, appellants filed a complaint with the Commission alleging that Pacific Progress Shippers Association, Inc. (Pacific or the Association), its members, and certain other designated persons were engaged in the business of freight forwarding, as that term is defined in Section 402(a)(5) of Part IV of the Interstate Commerce Act, 49 U.S.C. § 1002(a)(5), without a

permit from the Commission in violation of Section 410 (a) of the Act, 49 U.S.C. § 1010(a). A hearing on the complaint was held before a Commission examiner at which the following facts were developed.

Pacific is chartered under the law of the State of Washington as a non-profit membership corporation for the purpose of procuring the "pooling, consolidating, transportation and distribution of freight . . . . ." (Record: Exh. 5). In the performance of its corporate function, the modus operandi of Pacific's operations does not differ in any material respect from that of a freight forwarder as described in Section 402(a) of the Act. A receiver of freight in Seattle who has become a member of Pacific, may procure the transportation of a shipment to it from Philadelphia in the service of Pacific by simply instructing its supplier to tender its shipment to a common carrier by motor previously designated by Pacific and consigned to Pacific in care of an eastern consolidation agent previously designated by Pacific (Record: Exh. 4, p. 31; Exh. 34, pp. 4-5). At the terminal of the consolidating agent, the shipment is consolidated with the shipments of other users of Pacific's service, and tendered as part of a consolidated shipment to a railroad for transportation to Seattle. The consolidated rail shipment moves on a uniform straight bill of lading naming Pacific, or its consolidating agent, as consignor, and Pacific, or its distribution agent in Seattle, as consignee. When the consolidated rail shipment arrives at Seattle, the individual shipments of Pacific's members are separated by Pacific's distribution agent and transported to the members' places of business. For this service, Pacific bills each member a charge based on a single factor rate in cents per hundred pounds, which rate includes "all charges from point of origin to destination" (Record: Exhs. 1, 25, 26, 33). *Vis a vis* its members, Pacific assumes responsibility from the point of origin to destination for loss or damage to shipments, and its single factor rate is designed to cover the cost of insurance the Association maintains to protect

itself (Record: Exh. 31). To "give the member far greater protection than he is now receiving", i.e., that protection being received from a regulated freight forwarder, Pacific includes the cost of insurance in the rates it charges its members (Record: Exhs. 1, 48).

Besides providing all of the physical services of a freight forwarder, the record establishes that *vis a vis* its members, Pacific assumes all of the risks and burdens of providing the transportation service. Under the law of Washington, Pacific's members cannot be held liable for any of the Association's debts. Rev. Code, Wash. Title 24, Sec. 24.04.080. See also *Meiple* v. *Wenatchee North Central Freight Distributors*, 129 Wash. 619, 225 Pac. 819 (1924); Wash. Constitution, Art. XII, Sec. 4. Supplementing this immunization of the members against liability, Pacific's By-Laws provide that the only obligations of a member, other than to pay the charges on shipments moved for his account as provided in Article XI, are to pay, first, an initial membership fee (Article II), and, second, special assessments "to pay expenses incurred in establishing new operations or in performing unusual services," but only if he has agreed "in advance to participate in such new operations or to share the cost of performance of the unusual services," (Record: Exh. 6, Article II, Article XII). While the By-Laws require each member to advance $100.00 as working capital, Article XIV gives each member the right to the refund of this payment upon termination of membership (Record: Exh. 6, Article XIV). The By-Laws also purport to require members to post bond to guarantee freight charges on their own individual shipments (Record: Exh. 6, Article XV). The record establishes, however, that this requirement is largely disregarded and unenforced (Record: Tr. 226, 309, 325, 407, 496-97; see also Examiner's Report, 105 M.C.C. at pp. 214, 216, 218, 219, 231).

Several representatives of members of Pacific appeared as witnesses and testified to the effect that they and their

companies did not assume the financial risks of Pacific, and that their only liability growing out of their membership was to pay Pacific their own individual freight charges (Record: Tr. 176, 197, 230, 257, 325-326, 408, 496, 817; see also Examiner's Report, 105 M.C.C. at pp. 214, 215, 218, 219, 226, 231). The financial risk of Pacific's members being limited to the payment of their own freight charges assessed by the Association, the members thus bear no responsibility for the risk that the charges they pay for the transportation they receive will fall short of meeting the sum of Pacific's payments to the carriers whom it employs and its expenditures for other operating expenses. For that matter, the record is clear that no individual member bears the risk of this loss in the transportation of his own shipments. Pacific's members are quoted a firm rate before their shipments move, and the rate so quoted is the measure of their maximum obligation to Pacific (Record: Tr. 24-25, 284, 353, 559). For example, Pacific quotes rates showing "Association Fixed Costs Per One Hundred Pounds" from New York, Philadelphia, Chicago and Charlotte to Spokane, Seattle, Tacoma and Portland, Oregon (Record: Exh. 31). In some instances Pacific deliberately fixes its rates below costs. Thus, Pacific sent a "cost comparison sheet and routing guide" to the Ken Bush Company, a member in Spokane, Washington, and, in an accompanying letter, notes that some of Pacific's costs shown are higher than Ken Bush's costs via regulated freight forwarder. Nevertheless, the letter states that Ken Bush "will be protected on the present level of rates. In other words, at no time will the association costs from these services exceed rates via regulated forwarders." The Board of Directors of Pacific specifically approved this arrangement (Record: Exh. 45).

Pacific's auditors' report for the year 1963 shows accumulated losses from the beginning of its operation of $14,722.40 (Record: Exh. 56, Exh. A). As of December 31, 1963, Pacific owed its creditors $44,087.95 (Id). The

auditors used the monies in Pacific's "membership fund", i.e., the $100.00 initial fees of the members, to offset the Association's operating losses. The effect of this offset was to reduce the initial fees of 131 members in the total amount of $13,100.00 to a sum of only $2,105.03 as of December 31, 1963 (Record: Exh. 46, Exhibit a; Exh. 56, Exhibits A and C). As of December 31, 1964, there remained only $1,304.97 in this membership account, reflecting charges against the fund for travel, meetings of trustees, advertising and "servicing expense." (Record: Exh. 48, Exhibit C). As far as the record shows, this latter amount is all that remained of the so-called "paid in capital" of the membership available to offset the substantial liabilities and operating deficits of the Association.

On these facts, appellants argued before the Examiner that the Association's members did not bear any financial risk in connection with the service being performed on their behalf by Pacific; that the members did not, as principals or otherwise, assume the essential risks and transportation burdens entailed in conducting Pacific's operations; and that the members of Pacific were therefore not engaging in the consolidation and distribution of freight by and for themselves, or through Pacific as their agent, within the meaning of the exemptive provision of Section 402(c)(1) of the Act, but were, in fact, purchasing for-hire transportation of the type which the Commission and the courts have held to be subject to regulation under the Act.

In his recommended report and order dated December 29, 1965, the Examiner recognized the necessity of ruling on these contentions, stating, 105 M.C.C. at p. 241:

> "While Part IV of the act provides for the economic regulation of freight forwarders, it also recognizes the right of all shippers, or their group, to combine their goods ,on a nonprofit basis, for the purpose of obtaining the transportation savings flowing from

> their collective ability to utilize volume rates. At the same time the statute precludes a shippers' association from purchasing, 'for compensation' a complete transportation service in which the details, risks, and responsibilities of freight assembly, consolidation, forwarding, break-bulk, and distribution are assumed for it by a person not licensed by the Commission."

The Examiner stated the statutory standard as follows, 105 M.C.C. at p. 241:

> "Where shipper-members themselves, to the exclusion of all others, control, direct, and dominate the freight consolidation and distribution services and assume all the risks and burdens, such operations are of the character specifically safeguarded by Section 402(c) (1)."

Again, quoting from the decision of the Commission in *Atlanta Shippers Association, Inc., Atlanta, Georgia—Investigation of Operations*, 322 I.C.C. 273 at 283, the Examiner stated the "appropriate test", in determining whether the shipper-members of the Association are purchasing a complete freight forwarder service, to be, 105 M.C.C. at pp. 241-242:

> "Are the freight consolidating and distributing operations such that any person or persons other than the shipper-members of the association (a) have any right or ability to control, direct or dominate such operations, or (b) bear the essential risks and burdens, financial and otherwise, of conducting the operations under consideration?"

The Examiner held that this statutory test had been met, stating, as his ultimate finding of fact, that ". . . the members [of Pacific] and their elected trustees assume the essential risks and burdens of the Association as well as control, direct and dominate its operations." On the basis of this single finding, the Examiner concluded that the evidence failed "to establish that the operations conducted by the defendants are not exempt from regula-

tion by the Commission under Section 402(c)(1) and (2) of the Act," and recommended the complaint be dismissed. 105 M.C.C. at p. 246. The Examiner made no subsidiary findings of fact to support his ultimate finding of fact and conclusion, his treatment of the record being limited to a recitation of the evidence presented by the parties.

Appellants filed exceptions to the recommended report and order. In a one page order dated June 20, 1966, the Commission, Division 1, adopted the Examiner's Report without opinion, stating, with one exception not here pertinent, "that the statement of facts, the findings, and the conclusions of the Examiner . . . being proper and correct in all material respects, should be, and they are hereby affirmed and adopted as our own." 105 M.C.C. at p. 200.

On October 4, 1966 appellants filed suit in the United States District Court for the District of Columbia to enjoin, vacate and set aside the Commission's order. Appellants grounded their action on the contentions, *inter alia*, that the Commission had violated the Administrative Procedure Act by failing to make the essential findings of fact and conclusion and state the reasons and bases therefor upon the material issues of fact and law presented on the record, and that its determination that Pacific's members assumed the essential financial risks and burdens of the Association was contrary to the evidence, contrary to the statutory standard it purported to apply, and inconsistent with Commission and judicial precedent. The case was heard before a statutory three judge court, composed of Prettyman and Miller, Senior Circuit Judges, and McGarraghy, District Judge, which on December 6, 1967 issued its per curiam decision dismissing the complaint. After reciting the language of Section 402(c)(1) of the Act, the Court held, *in toto*, as follows (Appendix, p. 5a):

> 'The findings clearly show these terms to be descriptive of the organization and operation of the Association here involved. The evidence in the record

amply supports these findings. The examiner and the Commission so concluded. We agree.

"Much discussion is devoted by counsel for all parties, and by the Commission itself, to the meaning of various interpretive pronouncements of the Commission upon this subject. We think the answer to the problem is more easily reached by direct consideration of the terms of the statute itself. The complaint will be

Dismissed."

THE QUESTIONS ARE SUBSTANTIAL

This appeal brings questions of first impression to this Court as to the authority of the Commission under Section 402(c) of the Interstate Commerce Act to exempt from regulation under Part IV thereof groups of shippers claiming to be operating as shippers' associations in the consolidation and distribution of freight for themselves and their members.

The Commission for the first time has here applied Section 402(c) to permit a group of shippers, organized as an incorporated association, to conduct an exempt freight forwarder service in which no shipper member incurs any risk or bears any financial responsibility for the acts and debts of the corporation in performing the transportation business on his behalf. The Commission did so without stating any findings, conclusions or reasons to justify this result under the statute, on the basis of an unsupported determination that the members met the statutory test for exemption because they assumed the essential financial risks and burdens of the association. The decision hopelessly confuses, if it does not obliterate, the distinction heretofore existing between group activities of shippers in providing their own transportation and the operations of regulated forwarders conducting for-hire transportation, and gives strong impetus to further growth in the number, size of memberships and operating scope of exempt

forwarding operations which have already succeeded, in recent years, in diverting substantial traffic and revenues from common carriers serving the general public. Not only does the Commission's action have no rational factual or legal basis, it serves to defeat one of the vital objectives of economic regulation which Congress intended under the Act. The direct consequence of the decision is to considerably worsen the economic plight of regulated carriers for whom the Commission is bound under the National Transportation Policy to "foster sound economic conditions in transportation and among the several carriers." 49 U.S.C. preceding §§ 1, 301, 901, 1001.

Undoubtedly, the most important and most vexing problem which the Commission has faced in its administration of the Interstate Commerce Act in the past ten years is the so-called "gray area" of transportation, i.e., unauthorized transportation conducted under the guise of legitimate private carriage pursuant to a claim of exemption under one of the exclusionary provisions of the Act. Recognizing that reasonable restraints on unregulated transportation are important to the continued welfare of a regulated national transportation system, and that information was almost totally lacking as to the nature and extent of unregulated operations, the Chairman of the Senate Committee on Interstate and Foreign Commerce in the latter part of 1959 directed the Commission to analyze and assemble available information on gray area transportation. The results of this study were published in Commission Statement No. 6010, *Gray Area of Transportation Operations*, which was completed and submitted to the Committee in June, 1960.

Among the many and varied types of unregulated operations discussed in the study, the Commission advised the Committee that a gray area existed in transportation by associations operating under the claim of the Section 402(c) exemption (Statement No. 6010, p. 102). The Commission was unable to inform the Committee as to the

volume of traffic handled by this or other gray area operations, stating that no statistics are available to measure the volume of tonnage being diverted from authorized carriers (Statement No. 6010, p. 108).[1] However, in summarizing the effects of gray area operations, the Commission told the Committee, *inter alia*, that a "large part" of the traffic of shippers' associations and other unauthorized operations is a direct diversion from regulated carriers; that such diversion affected the balance and efficiency of common carrier operations and resulted in significant losses of revenue and higher ratios of expense to such revenues; and seriously impaired the operations of specialized commodity carriers and carriers serving small towns and remote points. Speaking of the "long run interest of shippers and the general public interest in transportation," the Commission warned that "the continued development of gray area transportation could be detrimental in terms of fewer authorized carriers available, less frequent schedules, reductions in scheduled carrier equipment—in general, a decline in the quantity and/or quality of regulated for-hire transportation." Moreover, the Commission specifically pointed out that "among the factors which could encourage the further development of gray area transportation" were "the formation of unlawful shipper cooperatives . . . which directly promote gray

[1] The Commission stated:

> "One of the functions of a transport regulatory body is compilation of data on carriage subject to regulation. Information on unauthorized transportation, however, is obtained only by special research, or in connection with proceedings before the regulatory body involving such transportation. Statistics of unlawful operations investigated by the Commission and other regulatory agencies could not be made available on a uniform basis in any event because of the differing nature of data required in individual proceedings.
>
> "'Thus, the inherent nature of the gray area precludes obtaining complete or fully reliable data for operations falling within this area; and intensive analysis of the problem is hindered by the lack of an adequate statistical foundation." (Statement No. 6010, pp. 2-3).

area operations," and "the need felt by shippers to use such transportation to reduce costs and remain competitive with other gray area users." (Statement No. 6010, pp. 108-109).

The Commission's fear that gray area operations would snowball to the increasing detriment of regulated transportation has been borne out in the intervening eight years. In 1960 the Commission estimated the number of organizations operating without authority under claim of the Section 402(c) exemption to be approximately 135. (Statement No. 6010, p. 105).[2] In November 1967, the Commission released Statement No. 67-2, *The Role of Regulated Motor Carriers in the Handling of Small Shipments*, in which its Bureau of Economics pointed to the "increasing number of such associations now estimated as over 300 . . . ," and stated that more shippers "are resorting to the practice of performing their own transportation service" with the result that private carriage "both legal and illegal, today poses probably the greatest single existing threat to the future welfare of the general commodity motor common carrier." (Statement No. 67-2, pp. 95, 104).

Concurrently with the release of Statement No. 67-2 the Commission on November 30, 1967, issued a document entitled *Small Shipments Problem, Report of the Ad Hoc Committee of the Interstate Commerce Commission*, composed of Commissioners Murphy, Walrath, and Brown. This Report, which was made at the direction of the Commission's Chairman, characterized the so-called small shipments problem as "a misnomer" because an "analysis of complaints revealed that regardless of weight, volume, or configuration of shipments, service difficulties existed," and that while such problems "cut across modal lines, . . .

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[2] The Commission stated: "A question exists whether certain of these associations are conducting unlawful operations as freight forwarders. It is not known what percentage of total operations of the freight forwarding type are conducted under exemption." (Statement No. 6010, p. 106).

the most crucial area related to the motor carrier industry." (Ad Hoc Report, p. 1). Discussing the causes and possible solutions for this problem the Ad Hoc Committee noted that "one of the most frequent complaints of regular route carriers of general freight is that, while only they have an obligation to provide consistently scheduled service to all shippers, carriers engaged in unlawful operations, and many other carriers—exempt, contract and irregular route—are too readily allowed to transport the most attractive traffic thereby reducing the ability of regular route carriers to maintain quality service for all shippers." Conceding the merits of this contention, the Ad Hoc Committee stated that the Commission appears to have accepted its partial validity "by seeking now to enforce greater observance of the act . . . [and] . . . by recommending partial repeal of certain exemptions . . . ." (Ad Hoc Report, p. 8).

Appellants, and their members, share the Commission's desire to maintain a viable common carrier system capable of serving the entire shipping public. Whether they be big or small, remotely located or concentrated in large urban centers, shippers and receivers of freight have a right to expect satisfactory service at reasonable rates. This expectation cannot be realized in the face of unduly broad interpretations of the Act which, as here, encourage the unrestrained growth of unregulated competition which the Commission itself recognizes seriously threatens the ability of motor carriers to render such service. While the Commission claims that it is seeking to enforce greater observance of the Act and to narrow the exemptions permitting unregulated transportation, its decision here accomplishes precisely the opposite result.

I

In *United States* v. *Drum*, 368 U.S. 370 (1962), this Court was recently confronted with the question whether particular transportation was "for-hire" carriage subject to economic regulation under the Interstate Commerce

Act, or was, in fact, transportation by a shipper of his own goods exempt from regulation. Enunciating at the outset, the principles which must govern this determination, Mr. Justice Brennan, writing for the majority, stated, 368 U.S. at 374-376:

> "From the beginning underlying principles have been, and have remained, clear. A primary objective of the scheme of economic regulation is to assure that shippers generally will be provided a healthy system of motor carriage to which they may resort to get their goods to market. This is the goal not only of Commission surveillance of licensed motor carriers as to rates and services, but also of the requirement that the persons from whom shippers would purchase a transportation service designed to meet the shippers' distinctive needs must first secure Commission approval. See Contracts of Contract Carriers, 1 M.C.C. 628, 629; Keystone Transportation Co., 19 M.C.C. 475, 490-492. The statutory requirement that a certificate or permit be issued before any new for-hire carriage may be undertaken bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market. Accordingly, the statutory definitions, while confirming that a shipper is free to transport his own goods without utilizing a regulated instrumentality, at the same time deny him the use of 'for compensation' or 'for-hire' transportation purchased from a person not licensed by the Interstate Commerce Commission. Because the definitions must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal. From the outset the Commission has correctly interpreted them as importing that a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—assume in significant measure the characteristic burdens of the transportation business. The problem is one of determining—by

reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure." (Footnote omitted).

What are "the characteristic burdens of the transportation business" which the Court in *Drum* said a shipper must bear in order to perform the unlicensed transportation of his own goods? There, a shipper, Oklahoma Furniture Manufacturing Company, claimed that the transportation of its goods in equipment leased from and operated by so-called owner-operators having no certificates from the Commission, was private carriage exempt from regulation under Part II of the Act by Section 203(a), 49 U.S.C. § 303(a). Under the leasing arrangements, which were for renewable terms of one year, the shipper was granted the sole right to control the use of the tractors through the owner-operators employed by it. Oklahoma paid for its use of the tractors on a mileage basis, with the operating costs, including gasoline, oil, grease, parts and registration fees, being paid by the owner-operators. No responsibility for wear and tear or damage to the tractors was assumed by Oklahoma, nor did it provide collision or fire and theft insurance coverage. Oklahoma paid for public liability and property damage insurance on each vehicle, and the owner-operators assumed no responsibility to Oklahoma for damage to cargo. While the owner-operators were required to pay for repairs to equipment, Oklahoma conducted safety inspections, and assumed other responsibilities such as administering physical examinations to the drivers, supervising the preparation of reports required by the Commission, paid social security taxes and withheld income taxes, and provided workmen's compensation, 368 U.S. at 378, 379.

On these facts the Commission held that the transportation was for-hire rather than private, grounding its determination on two findings: first, that persons other than the shipper had the right to control, direct, and

dominate the transportation; and, second, that persons other than the shipper were, in substance, engaged in the business of transportation of property for-hire. 79 M.C.C. at 409-410; 368 U.S. at 381. On appeal the District Court for the Western District of Oklahoma reversed, basing its decision solely on its disagreement with the Commission's first finding as to shipper control. *Drum* v. *United States*, 193 F. Supp. 275 (1960). On appeal to the Supreme Court, the Commission did not challenge the district court's conclusion on the control issue, 368 U.S. at 381, but instead attacked the court's failure to pass on the correctness of the Commission's second finding, contending that affirmance of the Commission's decision on this point required affirmance of its order. Agreeing with the Commission, this Court reversed the district court. Holding that "a finding of shipper control does not require a resolution of the ultimate issue in the shipper's favor," the Court stated that while the Commission's "initial technique" assessed the shipper's assumption of the burdens of transportation in terms of the degree to which he undertook to "control" or "dominate" it, throughout its reports the Commission has taken note of "various factors which clearly transcend any narrow concept of physical direction of the details of the operation," and that "it has always been apparent that the vesting of such physical 'control' in the shipper would not in itself suffice to render the transportation private carriage." 368 U.S. at 382, 383.

Stating the question to be whether the shipper "had so far emancipated itself from the burdens of transportation that to permit it, on such terms, to secure a transportation service from these unlicensed owner-operators would be inconsistent with the statutory scheme," the Court held that, while the shipper's modus operandi possessed many of the hallmarks of bona fide private transportation,

> "Still, the Company was able to spare itself—and pass to the owner-operators—certain characteristic burdens of the transportation business. The large

> capital investment in the tractors and the risk of their premature depreciation or catastrophic loss, was borne by the owner-operators, not by the Company. The owner-operators, rather than Oklahoma, stood the risk of a rise in variable costs such as fuel, repairs and maintenance of the tractors in good operating condition, and living expenses, although the thirty-day cancellation privilege, taken together with the possible bargaining power of the owner-operators *en bloc*, may have affected the degree to which that burden was actually shifted. Finally, Oklahoma was able to divest itself, to a significant extent, of the risk of non-utilization of high-priced equipment. The owner-operators received neither rental payments nor wages when their tractors were not used and they did not drive. Oklahoma did, however, carry the risk of a nonproductive backhaul." 368 U.S. at 379.

The *Drum* case thus makes clear that in order for shippers to perform their own transportation free of regulation, they must assume all of the essential risks and major burdens inherent in the particular transportation operation. The shippers, and not someone else, must assume the risk of investment in equipment and other assets necessary to carry on the transportation; the shippers and not someone else, must bear the risk of operating deficits occasioned by fluctuations in the variable costs of operation; and the shippers, and not someone else must bear the ultimate risk that the transportation venture may be unprofitable and fail.

Within a few months after this Court decision in *Drum*, the Commission held its rationale to be equally applicable in determining the bona fides of a group or association of shippers providing transportation of their own goods under Section 402(c)(1) of the Act. In *Atlanta Shippers Association, Inc.—Investigation of Operations*, 316 I.C.C. 259 (1962), the Commission was presented for the first time with the primary problem of determining the essential line of demarcation between the nonregulated con-

solidating and distributing activities of a group or association of shippers and those of a freight forwarding operation subject to the licensing provisions of Part IV of the Act. Pointing to a recent and substantial increase in the number of shipper associations operating under the claim of exemption, and the considerable difficulty encountered in distinguishing between their services and those of regulated forwarders, 316 I.C.C. at 259, the Commission, Division 1, stated, 316 I.C.C. at 279:

> ". . . general considerations must be accorded practical application; and, of necessity, unregulated competition in any regulated industry must be confined within certain practicable limitations which are to be determined by the substance and not by lable. *United States* v. *Drum*, 368 U.S. 370 (1962). Admittedly, the line of demarcation between these two general types of service—regulated and unregulated —may not always be clear, and in these instances there arises the problem of determining the applicability of the governing standards to the facts in each case. Not all persons calling themselves shippers' associations or agents are entitled to the benefit of the statutory exclusion of section 402(c), for the definition of a shippers' association must be interpreted in a manner which transcends the merely formal, and it is the economic reality behind the arrangements, not their form, which is determinative. To borrow from the language of the court in *Interstate Commerce Commission* v. *A. W. Stickle & Co.*, 41 F. Supp. 268, 273, (E.D. Okla. 1941): 'It is the effect of the plan, of what is actually being done, rather than the designation of it by the person concerned * * * that is to govern if the beneficial results intended by the Act are to be attained.' "

In determining whether the arrangements and practices of a particular operation are those of a shippers' association or a for-hire forwarder, Division 1 stated the ultimate inquiry to be, 316 I.C.C. at 278:

"Are the freight consolidating and distributing operations such that any person or persons other than the shipper-members of the association (a) have any right or ability to control, direct, or dominate such operations, or (b) bear the essential risks and burdens, financial and otherwise, of conducting the operations under consideration?. Both aspects of this question must be answered in the negative if the challenged operations are, in substance and reality, those of a bona fide group or association of shippers operating on a nonprofit basis for the purposes specified in the act. In short, the operations conducted in the name of a purported shipper association, in order to come within the statutory exclusion, must be conducted by the association, which at all times acts as *agent* for its shipper members who, *as its principals*, (1) possess the *exclusive* right and ability to control the operations and (2) assume, both jointly and severally, the essential risks entailed in conducting such operations. In sharing the transportation savings resulting from associating with other shipper-members, there is an obligation on each member of such association to bear the ultimate responsibility for the acts of each other performed in the operation of the association, as well as for the acts of the agent association which are within the scope of its authority. In these circumstances then, the association merely does for the members, as their agent, what they could do, legally and pursuant to the exclusionary provisions of section 402(c), for themselves. Cf. *Pacific Coast Wholesalers'* case, *supra;* and *ABC Freight Forwarding Corp. Ext.—Massachusetts*, 285 I.C.C. 276, *affirmed sub nom., ABC Freight Forwarding Corp.* v. *United States*, 125 F. Supp. 926 (S.D.N.Y. 1954), *affirmed per curiam*, 348 U.S. 967 (1955). (Emphasis the Division's).

On reconsideration the full Commission affirmed Division 1's determination that Atlanta Shippers was not an exempt shippers association but a freight forwarder. In doing so the Commission specifically approved the Divi-

sion's "conclusion that the shipper-members of the association may not free themselves of the characteristic burden of consolidating and distributing their collective goods and still claim the benefits of Section 402(c) with respect to such operations. . . ." 322 I.C.C. 273, 284, and agreed with the Division's substantive test, which it restated in the form of the following "basic question":

> "Are the freight consolidating and distributing operations such that any person or persons other than the shipper-members of the association (a) have any right or ability to control, direct, or dominate such operations, or (b) bear the essential risks and burdens, financial and otherwise, of conducting the operations under consideration"?

The full Commission also agreed that both parts of this question must necessarily be answered in the negative in order to avoid the conclusion that the purported members of a group or association are in fact purchasing transportation from a person or persons engaged in unlawful freight forwarding service. 322 I.C.C. at 283.

The Commission here resolved these questions favorably to the Association. But it cannot be gainsaid that its negative answer to the second prong of the question constituted a flat rejection of the statutory test laid down in the *Drum* and *Atlanta Shipper* decisions. Not one finding of fact was made in support of the Commission's conclusion that Pacific members "assume the essential risks and burdens of the Association." The facts before the Commission were undisputed, and showed beyond a shadow of a doubt that the members of Pacific have no obligation whatever to the association unless they choose to use its services; that under Pacific's corporate charter and the provisions of its by-laws, the members enjoy complete immunity from all debts and liabilities of the association; and that where a member chooses to use the services of Pacific, the member's only liability in doing so is to pay a predetermined, and fixed freight charge assessed by the

association for the complete movement of his goods from origin to destination. How, in the absence of any findings to the contrary, could the Commission rationally conclude that the essential financial risks and burdens of the transportation are borne by the members, when Pacific's charter, by-laws, the law of the state of incorporation, and the testimony of its own members conclusively established that such risks and burdens, already existing in the form of substantial operating deficits and liabilities, are the financial responsibility, not of the members, but of the association? If, as the record makes clear, the only obligation assumed by a member, besides a nominal and refundable membership fee, is the payment of his freight charges, which, of course, is the very same risk, and no more, that a shipper assumes in hiring the services of a regulated common carrier or freight forwarder, exactly what are the characteristic burdens of transportation which the Commission here held the members have assumed?

Having failed to consider much less decide the fundamental issue before it, the Commission, through counsel, defended its decision in the district court by arguing, directly contrary to its conclusion here, that Pacific's members were not required to bear the essential financial risks of the Association. Relying on the second report on reconsideration in *Atlanta Shippers*, it contended that the shipper members are free, under Section 402(c), to jointly and severally insulate themselves from all the risks and financial liabilities of the Association. Since the District Court believed the answer to the problem "more easily reached by . . . the terms of the statute itself" rather than in the "various interpretative pronouncements of the Commission on this subject," it did not pass on the merits of this contention. That the argument has no merit is apparent from a reading of the two reports in *Atlanta Shippers*.

In the first report in *Atlanta Shippers*, Division 1, while stating that it was "not essential to the disposition of

the instant proceeding," addressed itself to arguments of the parties as to whether or not an incorporated shippers' association qualified as a "group or association of shippers" under Section 402(c) of the Act. Answering this question in the negative, the Division was of the view that the "corporate form of organization is basically inconsistent with, and inimical to, the kind of agency relationship with its intended mutuality of obligation, which must be preserved between the group or association and the member-shippers." 316 I.C.C. at 286. The Division pointed out, however, that substance rather than form controlled, and that its determination on this issue did not necessarily preclude the enjoyment of the exemption by a group of shippers which, while actually incorporated, functioned as a *de facto* association in which its members jointly and severally assumed responsibility and liability for the activities of the organization. 316 I.C.C. at 288. On reconsideration, the full Commission disagreed with this dictum. In a closely divided decision, a bare majority of six commissioners said that a corporation should not be disqualified from the benefit of the exemption merely because of its corporate form of organization. The difference in view of the majority on reconsideration with that of the five member minority, which agreed with Division 1, was not whether the members should be free of the financial risks and burdens of the association, but whether "the fact of incorporation, standing alone," can "be said to alter significantly the regulatory status of the otherwise lawful freight consolidating and distributing activities of a group or association of shippers." 322 I.C.C. at 286.

This is clear from the opinions of Commissioner Tucker, who wrote the majority's view on reconsideration and also a concurring opinion to the decision of Division 1, in which he disagreed with the Division's conclusions on the corporate issue. In concurring with Division 1, Commissioner Tucker agreed with the Division's test of substance, but criticized its views respecting joint and several lia-

bility and corporate status as "an intricate maze of technical yardsticks and indicia, [which] lost sight of the basic purposes of the Act." 316 I.C.C. at 289, 290. The crux of his criticism was that, by laying down a predetermined test of partnership liability which excluded corporations from the exemption, the Division was establishing a formal rather than a substantive test which ignored the actual relationship and responsibilities of the members *vis a vis* an association. Thus, he stated, 316 I.C.C. at 291:

> "To some extent, the position of the majority [of Division 1] with respect to the corporate issue is predicated upon the erroneous assumption that a corporation, *ipso facto*, is founded to limit the responsibilities and burdens incurred by its members of shareholders. This may not necessarily be the case, however, for the basic distinction between an association and a corporation is not to be found in the extent of the liability which the members are required to assume. Such liability may be varied by special legislative enactments in the case of an association or by appropriate modification to a corporation's charter and bylaws. On the other hand, corporations frequently are formed as a means of limiting the liabilities and responsibilities of those who select that mode of operation and might well be used as a device to cloak the for-hire freight forwarding activities of persons other than the apparent shipper members in the guise of a legitimate shipper association. When this is the case, it is clear that the freight consolidating and distributing activities in question actually are being performed in violation of part IV of the act, and that the corporate device is being utilized as a mere subterfuge to escape regulation. Consequently, when confronted with incorporated 'associations' of shippers, the purposes of incorporation as well as the manner in which such 'associations' actually function must be evaluated in the light of all the relevant facts of record."

Writing for the majority on reconsideration, Commissioner Tucker expanded on this view, stating 322 I.C.C. at 287:

> "Nor are we able to perceive anything in either the makeup or functioning of an incorporated shippers' association which would automatically bring the operations of such an organization within the licensing provisions of the statute. In this connection, division 1 viewed the incorporation of a shippers' association as establishing a legal barrier or separation between the shippers and their corporation which effectively insulates such shippers from the burdens normally inherent in the considered transportation activities, and which constitutes such shippers as 'purchasers' of a complete freight forwarder service. This view, however, overlooks and disregards the basic nature of the relationship between the shippers and their group or association, which relationship exists whether or not the group or association is incorporated. *Pacific Coast Wholesalers' Case, supra.*"

Pointing out that "there can logically be no effective insulation placed between [an association's members] and third persons," Commissioner Tucker concluded the majority opinion on reconsideration by stating, 322 I.C.C. 288:

> "We do not mean to say, however, that the circumstances of incorporation, and the facts surrounding such incorporation, are not something to be weighed in ascertaining the basic nature and true status of purported shipper-association operations. We will go behind the corporate form in any case to establish the essential facts. See *Erie Endowment* v. *United States*, 316 F. (2d) 151 (claimed exemption from income tax). These facts, like all others attendant to a given operation, must be weighed and considered together in order to arrive at a correct assessment of the total fact situation. And where it appears that the corporate form of enterprise has been purposely chosen as a subterfuge or device by which to escape

regulation under the act, appropriate weight will be accorded that fact in finding the operations in question to be those for which authority is required."

While a narrow majority of the Commission disagreed with the Division's views as to joint and several liability, this disagreement stemmed not from any conviction that the members of an association were free to immunize themselves from all such liability, but from the fear that a predetermination of such liability as a statutory standard of qualification for the exemption, like the Division's disqualification of the corporate form, would place form over substance. Characterizing joint and several liability as " 'partnership' liability", the majority plainly regarded this aspect of the Division's opinion as the other side of the coin with respect to the corporate issue in that it would establish as a prerequisite to exemption a particular type of organizational structure, viz, a partnership, which would automatically exclude the corporate and other forms of organization. Thus, on reconsideration, Commissioner Tucker stated that "we will not gratuitously adopt conclusions imposing grave legal consequences upon organizational distinctions that are here of *de minimis* meaning and effect." 322 I.C.C. at 287. But, in concurring with Division 1, he made clear his belief that the members of an association were required to assume responsibility for the expenses and liabilities incurred in the transportation operations of an association, and that the nature and extent of this financial responsibility, both to the association and to other members and third persons dealing with it, were relevant factors in determining whether the organization was exempt under Section 402(c).[3]

[3] Commissioner Tucker stated, 316 I.C.C. at 292:

"The nature and extent of the actual responsibilities of association members vis a vis the association itself and third persons, as well as among themselves, also are germane factors in examining the status of an association under the statutory exclusion of section 402(c) of the act. But I confess I have

Both the majority and minority in *Atlanta Shippers* agreed that there is a basic nature in the relationship between the shippers and their association which cannot be altered by incorporation, citing the *Pacific Coast Wholesalers'* Case for this proposition. *Pacific Coast Wholesalers' Association, Investigation of Status*, 264 I.C.C. 134 (1945), findings modified on further hearing, 269 I.C.C. 504 (1947); reversed, *Pacific Coast Wholesalers' Association* v. *United States*, 81 F. Supp. 991 (S.D. Calif. 1949); aff'd per curiam, *United States* v. *Pacific Coast Wholesalers' Association*, 338 U.S. 689 (1950). There, this Court affirmed a decision of the district court which held that the basic nature of this relationship is one of *agency*, and that its existence between the members and the group or association is the determinative factor in passing on the bona fides of the association. The district court so held notwithstanding that Pacific Coast Wholesalers' Association was incorporated. Unlike the incorporated association here, however, the fact of incorporation there did not alter the principal-agent relationship between the association and shippers because the members specifically agreed in the corporation's by-laws "that in addition to the cost and expenses incidental to the consolidating, forwarding, and handling of shipments for its members, assessments may be levied by the directors from time to time against the members in amounts deemed sufficient to meet overhead, management, and administration expenses," and, in addition, agreed to provide working capi-

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no precise understanding of what will be required to establish the 'joint and several' liability discussed in the report, or of the intended meaning of that requirement. In fact, in any specific factual situation it probably would require an actual lawsuit to establish that there is or is not a joint and several liability among the members of an association. This type of uncertainty as to the effect of a law or rule leads much too frequently to unnecessary litigation. For a starting point, even under the majority opinion, I am not at all certain that it would be enough for an association to provide by charter that its members may be assessed periodically for the expenses and liabilities incurred in the operations of the association."

tal to the corporation. 264 I.C.C. at 135. Hence, the shipper members, as principals, specifically undertook to assume all liabilities incurred in their behalf by the incorporated association acting for them as their agent.

It is a fundamental rule of agency law that the principal is bound by, and liable for, the acts, whether tortious or contractual, which his agent does with or within the actual or apparent authority of the principal, which the agent does within the scope of his employment, or which the principal ratifies with knowledge of all the material facts surrounding and attending them. 3 Am. Jur. 2d, *Agency*, Section 261, pp. 626, 627. This rule is founded on the common law maxims that a duty rests upon every man, in the management of his own affairs, whether by himself or by his agents or servants, so to conduct them as not to injure another, and that if he does not do so, and another is thereby injured, he shall answer for the damage. The principle rests on public policy which protects third persons, and recognizes that it is the principal who makes it possible for the agent to inflict the injury. Id. Section 262. It is this basic relationship which must exist between a shippers' association and its members. And it is this relationship which the Commission has wholly ignored. Here, the members of Pacific do not, as principals, assume the financial risk and transportation burdens incurred on their behalf by their agent, the association. To the contrary, the members have completely nullified this relationship, by effectively freeing themselves from both joint and several liability for the acts and obligations of their agent.

Citing its decision in Ex Parte No. 73, *Regulations for Payments of Rates and Charges*, 326 I.C.C. 483 (1966) the Commission argued before the district court that Pacific's members are responsible for the underlying carriers' transportation charges incurred by the association in handling the members' freight, and therefore bear the essential risks and burdens of transportation. This argument

finds no support in Ex Parte No. 73 and ignores the practical and legal realities of commerce. The proceeding in Ex Parte No. 73, the so-called credit case, involved an investigation under Sections 3(2) and 223 of the Interstate Commerce Act, 49 U.S.C. §§ 3(2), 323, which prohibit extensions of credit by rail and motor carriers except under such rules and regulations as the Commission may prescribe. The Commission instituted the investigation to ascertain the problems and practices of the carriers in collecting their charges and determine whether the Commissions' existing credit regulations were adequate. On the basis of the factual record there developed, the Commission found that it was a common practice among shippers' associations operating under the Section 402(c) exemption to withhold sufficient information to enable the carriers to compute their tariff charges, with the result that delays up to 102 days were being experienced by carriers in the collection of their charges.

The Commission considered several proposals to solve this problem, two of which would have provided that a surety bond be posted by each member of an association, or, alternatively, required that each shippers' association furnish a single bond in the aggregate of $10,000 covering all charges of all carriers used by the association. The Commission refused to require such bonds on two grounds: first, that it would place an undue burden on non-profit shipper organizations which might be discriminatory to the shipper members *vis a vis* non-association shippers, and, second, because a surety bond aggregating $10,000 would not be sufficient to cover the large losses suffered by the carriers in the majority of instances shown on the record. 326 I.C.C. at 494, 495.

Another proposal was to require each shippers' organization to present carriers with a statement that the organization is not the beneficial owner of the goods being shipped, and advising the carriers of the identity of the beneficial owner. The railroads, concerned by the large

losses suffered when non-profit shipper organizations become bankrupt, opposed this alternative on the ground that the disclosure of the beneficial owner of a shipment would serve no purpose because such shippers' organizations operate through a corporate entity, and the members are therefore not liable for the debts of the corporation. The Commission nevertheless adopted this proposal. Citing the second report in *Atlanta Shippers* to the effect that the shipper members of an incorporated association are responsible as the beneficial owners of the goods moved, and that there can be no effective insulation between them and third persons, the Commission stated, 326 I.C.C. at 495:

> ". . . we assume that all railroads take precautions to assure that credit is not extended in the future to shippers who have filed for bankruptcy, or have not paid past due freight bills for other reasons. Carriers must keep in mind at all times that the extension of credit to shippers is the exception and not the rule. Therefore, they must not extend credit as a matter of course but only when they are assured of payment. For these reasons they should know the identity of the beneficial owners of the goods shipped by non-profit shipper organizations. We will expect them to require such organizations to furnish the names of the beneficial owners in the future in the bills of lading or at least require that the bills of lading incorporate by reference a document containing such names. We feel such a requirement will be acceptable because of its salutary aim."

While the Commission paid lip service to the concept enunciated in *Atlanta Shippers* that the members of an association are financially responsible for carriers' charges, the Commission completely avoided, as it has done here, the guts of the question before it, namely, how to reduce this principle to practical application when, as the railroads argued, the shipper members are insulated from all liability for the debts of the association through

the device of incorporation. The Commission's rule requiring disclosure of beneficial shippers may have some "salutary aim", but it completely misses the mark insofar as assuring that members assume the financial risks and transportation burdens of a shippers' association. As the language quoted above makes plain, the only sanction under the Commission's credit regulation requiring disclosure is that a carrier, like any prudent business organization, must cut off credit to a shippers' association when it becomes apparent, upon an accumulation of unpaid charges or bankruptcy, that the association is no longer deserving of credit.

While it may insist that the members of a shippers' association may not effectively insulate themselves from third persons, the plain fact is that the Commission is powerless to enforce this obligation. Indeed, the Commission held in Ex Parte No. 73 that it has "no authority under the act directly to regulate shippers," and that its power to enforce the payment of transportation charges by shippers is limited to "the power to prohibit carriers from extending credit to shippers who owe past due charges." 326 I.C.C. at 490. It made this holding in rejecting the contentions of several parties in the *Credit* Case that the Commission had authority to impose sanctions against shippers as well as carriers, and that it should exercise such authority by adopting credit regulations imposing punitive measures against shippers violating them. Stating that Sections 3(2) and 223 are clear and unambiguous, and that Congress would have specifically included shippers in these provisions had it been its intention, the Commission concluded that shippers cannot be made subject to its credit regulations. 326 I.C.C. at 489.

If the Commission has no power to enforce payment of a carrier's charges by a direct shipper who is party to the bill of lading, under what legal theory can it claim that a shipper member of an association is liable for transportation charges incurred by the association under its contract of carriage with the carrier? The Commis-

sion and the courts have long held that one who is not a party to the contract of transportation by a common carrier cannot be held liable by the carrier for tariff charges. See *New York Board of Trade* v. *Director General*, 59 I.C.C. 205, 209, citing *Central Railroad Company of New Jersey* v. *Anchor Line*, 219 Fed. 716. The Commission has also held that "the law seems to be well settled that the party to whom a shipment is consigned is the legal consignee and not the party in whose care the goods are shipped." *Smokeless Fuel Company* v. *Norfolk & W. Railway Co.*, 85 I.C.C. 395, 401 (1923). The Commission still holds to this view. *Detention of Motor Vehicles—Middle Atlantic and New England Territory*, 318 I.C.C. 593, 607, 608 (1962).

If the Commission is impotent to force a shipper to pay a carrier's charges, and a carrier cannot, as a matter of law, hold a member liable for the association's charges, on what rational basis could the Commission here conclude that a shipper member of Pacific, enjoying a complete immunity from the debts of the shippers' association, is responsible for transportation charges incurred by that association? The mere fact that the Commission says that members are liable to third parties for debts of the association incurred on their behalf doesn't make them so liable if, in law and in fact, they are insulated from such liability by the organizational structure under which the association does business. This painful lesson is the teaching of a recent decision of the United States District Court for the Central District of California in *North American Car Corporation, et al.* v. *United States Rubber Company, et al.*, No. 65-1431-IH (Unreported, decided May 8, 1967). A copy of the court's bench decision, together with pertinent portions of the oral argument to the court, are set forth in the Appendix hereto at page 103a.

There North American Car Corporation and General Transport Equipment Company brought a class action on behalf of themselves and approximately 153 other credi-

tors against United States Rubber Company and numerous other members of Continental Shippers Association, Inc. to recover approximately $550,000 in indebtedness incurred by Continental in performing transportation for defendants as a shippers' association under the exemption in Section 402(c). Continental had voluntarily petitioned and been adjudicated a bankrupt by the district court on November 8, 1963. (Case No. 163513-WB). Continental was incorporated as a non-profit corporation under the law of California, the provisions of which protected its members from liability for the debts of the corporation. Confronted with the bankruptcy of Continental, plaintiffs were faced with the considerable difficulty of fashioning a legal premise on which to pierce the corporate shield protecting the members from liability for the substantial indebtedness incurred on their behalf by the association. Relying on such arguments as the alter-ego theory and estoppel, plaintiffs contended that shippers purporting to engage in transportation activities as a shippers' association were required under Section 402(c) of the Act to assume liability for the debts of the association, and that the defendant members of Continental has therefore held themselves out to plaintiffs and the public as being liable for Continental's debts. Pointing to the majority opinion in the second report in *Atlanta Shippers*, defendants, while conceding that they were "puzzled a great deal . . . as to just what the Commission meant here," argued that the language of the majority opinion dealing with joint and several partnership liability must be read as not requiring as a condition of exemption that the members be liable for the debts of the association.

Agreeing with the defendants, the Court dismissed the suit for failure to state a cause of action, stating, *inter alia*:

> "The whole basis for this third count is the contention that there could be no exemption unless the members were personally responsible, and thus when Defendants formed a corporation which claimed the ICC

exemption the effort to qualify for the exemption was tantamount to affirmative representations that they would be so responsible.

"This count must likewise be dismissed. It seems abundantly clear to me that if the ICC ever so interpreted the Act so as to make an attempted qualification for the exemption depend upon personal liability, it no longer so interprets it. In fact, in Atlanta Shippers the ICC has said that personal liability is not a requisite or a requirement for securing the exemption—certainly not the type of joint and several personal liability sought to be asserted here.

"Surely I cannot now hold, as a matter of law, that the effort of those Defendants to qualify their corporation for the exemption contained an implicit promise to be personally liable, which implicit promise rests solely on their effort at qualification. If I interpreted this count as stating a good cause of action, I would have to impose liability based upon an alleged attribute or an alleged element of qualification which the administrative agency has now agreed was illegal and beyond its jurisdiction.

"Of course, we could have a case in which a member of a corporation expressly and clearly guaranteed a corporation's obligation under a mistaken belief that it was necessary for the individual to guarantee the obligations in order for that corporation to qualify for some special privilege or benefit. But that is not this case, as Plaintiffs concede. There is no claim here that any Defendant expressly guaranteed any obligation."

Among the class of creditors represented in this suit were several carriers who, having failed to recover transportation charges from the bankrupt shippers' association, unsuccessfully attempted through the class action to recover them against the members for whom the charges had been incurred. In addition to these carriers, many other creditors were required, as a result of that case, to absorb the financial losses which this Court, in *Drum*, said are the

characteristic burdens of a private transportation operation. Thus, the two lead plaintiffs, North American Car Corporation and General Transport Equipment Company, were large suppliers of transportation equipment and rolling stock, who unsuccessfully attempted to place on the shipper members of Continental responsibility for the payment of substantial rental charges for equipment, principally railroad piggyback trailers and railroad flatcars, which were incurred on their behalf by Continental in the performance of the transportation service.

Read in the light of the *North American Car* Case, the Commission's decision here renders the Section 402(c) exemption wholly incongruous. On the one hand the Commission, while insisting that an association's members bear the essential risks and burdens of the operation, refuses, on some nebulous ground of lack of authority, to impose any restriction on the right of members to immunize themselves from these obligations. On the other hand, a federal district court has held that, since the Commission exercises no authority to impose liability on shipper members, they cannot be held liable for the debts of an association incorporated under state law protecting members from such liability. If the district court's interpretation of *Atlanta Shippers* is correct (and the Commission argued before the district court in this case that it was), then the Commission's construction of Section 402(c) is plainly irrational. If, as the Commission concedes, a relevant test of the statute requires the members to assume the association's essential risks and burdens, the Commission obviously has authority to impose membership liability as a condition to exemption. Indeed, Commissioner Tucker suggested this as a minimum requirement in the majority opinion in *Atlanta Shippers*.[4] Without such a requirement, the *North American Car* Case makes clear that shippers can and will do precisely what the Court in Drum said cannot be done, i.e., shift

[4] *Supra*, p. 27, fn. 3.

the essential transportation burden—the risk of financial loss—from themselves to someone else.

II

Turning to the procedural questions presented, there can be no doubt that the Commission's order fails to comply with the minimal standards of Section 557 of the Administrative Procedure Act, 5 U.S.C. § 557, requiring agencies to make findings and conclusions and state the reasons for their decisions. This error was compounded, in turn, by the district court's failure to perform its duty under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, by deciding the relevant questions of law before it on appeal of the Commission's order.

As stated, the Commission's order, and the examiner's report it adopts, contain no findings of fact or statement of its reasons or the basis for the ultimate conclusion that Pacific's members bear the essential risks and burdens of the association. The Commission's order simply cites, with no discussion, two of its decisions, *Atlanta Shippers*, and *National Motor Freight Traffic Association, et al.* v. *New Hampshire Shippers Cooperative, Inc., et al.*, 323 I.C.C. 658 (1964). In the latter case, no issue under the financial risk and burden test was raised, the Commission's decision turning entirely on whether the members exercised adequate supervision and control over that association's operations.

As for *Atlanta Shippers*, that decision provides no support for the Commission's order here. In the first place, that decision has never been subject to judicial scrutiny. There, the association was incorporated, and the Division found its members failed to assume its financial risks and burdens, which finding was not disturbed by the full Commission on reconsideration. But, as the Division made clear, the question of the nature and degree of member risk was "not essential to the disposition" of the proceeding, 316 I.C.C. at 286, and the full Commission, in affirm-

ing the Division on reconsideration, determined the association not to be bona fide on other grounds, principally because it had been organized and was controlled by an entrepreneur rather than the members. Thus, while practically all segments of the regulated surface transportation industry were parties adverse to the association in that proceeding, and urged a strict standard respecting membership risk and burden, the Commission there held the operation to be unlawful, and there was therefore no basis on which they could have appealed the correctness of the Commission's dicta views on the question of risk and liability.

It was not until this proceeding that the precise question was squarely raised before the Commission whether the members of an incorporated association, who were immunized from liability for all corporate debts, adequately shouldered the financial risks and burdens of transportation. It was not until this proceeding that the Commission was required to pass on this issue in order to determine the status of an association under the Section 402(c) exemption. Hence, the Commission's reliance on *Atlanta Shippers* here merely begged the question. Moreover, in view of the sharp conflict of opinion among the members of the Commission, and the fact that the narrow majority of the full Commission itself agreed on a test of substance in which the degree of actual responsibilities of members *vis a vis* the association and third persons was a relevant inquiry in construing the exemption, *Atlanta Shippers* shed no light on the reasoning underlying the Commission conclusion here, where no such test was applied on the basis of any inquiry.

Under these circumstances, the district court's *per curiam* affirmance of the Commission's order was clearly unwarranted. Since the Commission defended its order on the basis of the Report on Reconsideration in *Atlanta Shippers*, this case was, in effect, the first judicial test of the Commission's interpretation of Section 402(c) on

this important question. Briefs and argument to the court were framed within the *Atlanta Shippers* decision viewed in the light of the court's holding in the *North American Car* Case, and no party contended that the question of membership risk could be resolved on the basis of the language of the statute. Hence, the district court's summary holding that the considerable discussion "by the Commission itself, to the meaning of various interpretive pronouncements of the Commission upon this subject," was tantamount to a flat rejection of the grounds on which the Commission relied to support its order. And by affirming that order on the basis of "direct consideration of the terms of the statute itself," the court substituted its own rationale for that of the Commission.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, Appellants urge that jurisdiction be noted, and that the judgment of the district court be reversed and the case remanded to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas M. Knebel, one of counsel for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 29th day of July, 1968, I served copies of the foregoing document on the parties hereto, postage prepaid, to the following:

On Honorable Erwin R. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, and John H. D. Wigger, Esq., Attorney, Department of Justice, Washington, D. C. 20530.

On Robert W. Ginnane, Esq., General Counsel, and Manny H. Smith, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

On Ronald N. Cobert, Esq., 600 Madison Building, 1155 15th Street, N.W., Washington, D. C. 20005.

On James T. Johnson, Esq., 1610 IBM Building, 1200 Fifth Avenue, Seattle, Washington 98101.

THOMAS M. KNEBEL